Ceridian Corporation *and* Service Employees International Union Local 113. Case 18–CA–17123

November 12, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, WALSH, AND MEISBURG

On August 5, 2004, Associate Chief Judge William N. Cates issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief, and the General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ceridian Corporation, Eagan, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 12, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Service Employees International Union Local 113 by failing and refusing to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining sessions, while refusing to meet at times when the Union's bargaining committee is not scheduled to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, upon request, grant employee members of the Union's bargaining committee unpaid leave for the purpose of attending bargaining sessions, or in the alternative meet for bargaining at times when employee members of the Union's bargaining committee are not scheduled to work.

WE WILL restore the personal days off taken by employee members of the Union's negotiating committee for those occasions when we insisted negotiations take place during the normal work day and at the same time refused to grant the employee members of the Union's negotiating committee unpaid leave to attend negotiations.

CERIDIAN CORPORATION

[1] In adopting the judge's finding that the Respondent has violated Sec. 8(a)(5) and (1) as alleged, Member Meisburg notes that if an employer is concerned about the loss of employee services because of the employee's presence in negotiations, the employer may insist on a reasonable alternative; however, it cannot simultaneously demand that bargaining take place during work hours and refuse reasonable unpaid leave requests. See *Milwhite Co.*, 290 NLRB 1150, 1152 (1988). Here, the six employee-members are from among different work groups and departments among the Respondent's 130 bargaining unit employees, thus minimizing the impact of their absence from the work force during negotiations. Significantly, the Respondent's witness, Noreen Miller, admitted that the Respondent never explored with the Union whether there were times available when all the negotiators could be present and acknowledged the possibility that all employee-members could have been present without any impact on their work schedules during weekend days, when the Respondent refused to meet.

[2] We shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

Pamela W. Scott, Esq., for the Government.[1]
Donald W. Selzer Jr., Esq., and *Sandro M. Garofalo, Esq.,* for the Company.[2]

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in Minneapolis, Minnesota, on June 15, 2004. The case originates from a charge, filed by Service Employees International Union Local 113 (Union) on December 19, 2003, and amended on February 26, 2004, against Ceridian Corporation (Company). The prosecution of this case was formalized on March 30, 2004, when the Regional Director for Region 18 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued a complaint and notice of hearing (complaint) against the Company.

The complaint alleges the Company has violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by since on or about September 22, 2003, failing and refusing to bargain collectively and in good faith with the Union. Specifically it is alleged the Company has refused to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining sessions, and by insisting that employee members of the Union's negotiating committee must use their paid time off time for time spend at negotiations, while the Company refuses to meet at times when employee members of the Union's bargaining committee are not scheduled to work.

The Company admits that employee members of the Union's bargaining committee are, as are all other employees, subject to its personal days off (PDO) policy and that it declines to accord employee members of the Union's collective-bargaining committee preferential treatment, as compared to other employees, with respect to its PDO policy. The Company denies it violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the three witnesses as they testified. I have studied the whole record, the parties' briefs, and the authorities they rely on. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT[3]

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Company is a Delaware corporation with an office and place of business located in Eagan, Minnesota, where it provides payroll and human resources-related solutions and IT services. During the past 12 months ending March 24, 2004, a representative period, the Company derived gross revenues in excess of 1 million and during that same time purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Minnesota. The evidence establishes, the parties admit and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. OVERVIEW

On June 5, 2003, the Union was certified by the Board as the exclusive collective-bargaining representative of Company employees in an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The appropriate unit is as follows:

> All full-time and regular part-time production employees employed at the Company's Eagan facility in the following classifications: Clinical Coaches, Referral Specialists, Affiliate Network Manager, Network Development Specialists, and LifeWorks Consultants, including those with responsibility for consulting in the areas of Financial, Legal, Adoption, Education, Substance Abuse, Triage, Substance Abuse Case Management, Critical Incident and Management Line; excluding all other employees, including researchers, office clericals, and guards and supervisors as defined in the Act as amended.

At all times since June 5, 2003, the Company has recognized the Union as the exclusive collective-bargaining representative of the Unit employees. There are approximately 130 employees in the unit.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Company is an information services company providing a wide range of services, such as payroll and human resources solutions, to other companies throughout the United States. One of the specific services the Company provides to its customers (companies utilizing its services) is a call-in employee assistance program. Customer employees utilizing the employee assistance program can access information and referrals covering various services. Company Vice President of Service Delivery Noreen Miller, testified for example that, Company customer employees may, among other areas, seek and obtain advice and referrals related to financial and/or legal matters, substance abuse programs and assistance, mental health and/or emotional well-being assistance, as well as, child and/or parental or elder care.

The Company's employee assistance program call-in center is staffed 24 hours per day, 7 days per week, 365 days per year. The employee assistance program call-in center is staffed exclusively by the unit employees herein. The unit employees are exempt professional and/or specialists employees from among the areas of expertise referred to above. According to Company Vice President of Service Delivery Miller, the call-in center must be fully staffed at all times in order to promptly respond to customer employees' calls. Miller testified 90 per-

[1] I shall refer to counsel for General Counsel as Government counsel or the Government.

[2] I shall refer to the Respondent as the Company.

[3] The essential facts are not significantly disputed. Unless I indicate otherwise, my findings are based on admitted or stipulated facts, documentary exhibits, or undisputed and credible testimony given by the three witnesses herein.

cent of employee assistance program telephone calls are answered within 20 seconds of the call coming into the call-in center. Miller explained there are performance guarantees with financial penalties if calls are not expeditiously answered and responded to.

The Union and Company commenced negotiations toward a first collective-bargaining agreement for the unit employees on September 22, 2003. According to Union Business Representative Jayne Hetchler, one of the first topics discussed was accounting for time spent by employee members of the Union's negotiating team attending negotiations. The Union requested that employee members of its negotiating committee be allowed to take leave without pay to attend bargaining sessions and the Union would compensate those members directly or reimburse the Company if the Company paid the employees through the payroll system. The Company, however, insisted that absences incurred by employees while attending contract negotiations be charged against the employees' PDO accounts, in full-day segments, in the same manner as any other personal leave taken. Company Vice President of Service Delivery Miller explained the Company did not give unpaid time off for personal reasons under any circumstances and would not treat employee negotiators any differently. The Company further explained that due to scheduling concerns regarding the call-in center, it was unwilling to permit employees on the negotiating committee to simply take unpaid leave in lieu of PDO. The Company maintained, at negotiations, that the efficient operation of its call-in center depended, for the most part, on dependable staffing. The Company offered to allow employees to take PDO time in one-half day increments on those occasions when bargaining only lasted a half day. The Company also offered to allow employees to borrow PDO time from their next year's allocation if they exhausted their current years allotment. The Union continued to seek to have its employee negotiators be permitted to take leave without pay for time spent participating in negotiations.

The parties scheduled additional bargaining sessions after their initial session on September 22, 2003. Tentatively, one or two sessions were scheduled outside the normal workday, however, those sessions were cancelled. All sessions have been held during the normal workday. The Union employee committee members have been required to utilize PDO for negotiations.

In an October 3, 2003 letter to Union Business Representative Hetchler the Company, by its labor counsel, indicated it wished to "repeat and clarify" its position regarding the required use of PDO by the Union's negotiating team members. The letter in pertinent part stated:

> As you know, the Eagan service center employees respond to client Employee calls 24 hours a day. Counselors with specific skills and specialties are needed 24 hours a day so that our clients' employees can be served.
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> * * * *
>
> Because we cannot anticipate how long any of our negotiating sessions will take, it is impossible for Ceridian to allow six of seven employees designated by the SEIU to be gone form their job without them taking PDO. If we agree in advance to limit a negotiating session to three and a half hours, Ceridian will allow the employees on the team to take one-half day PDO instead of a full day. The demands of Ceridian's business do not permit it to give these 7 employees more time away from the job than its generous PDO policy already affords them. If any team member uses all their allotted PDO Ceridian will allow them to borrow from next year's allotment, which is credited to their account in total at the beginning of the year and then is accrued as the year progresses—see the PDO policy provided to you in response to the SEIU information request.
>
> With respect to our next meeting for negotiations, I can confirm October 16 as an acceptable date to Ceridian. However it is Ceridian's desire that all such meetings be conducted during normal business hours. All of the team for Ceridian and all but two of the SEIU employee teamwork business hours and scheduling negotiations outside of those hours is an unwarranted intrusion into personal time and family commitments. We are flexible concerning whether to commence the next meeting in the morning or in the afternoon. Please advice [sic] concerning your preference on this.

Union negotiating committee member, employee Gerald Buchko, testified union-negotiating members volunteered to serve. Buchko said a number of employees declined to serve because they were required to use their PDO for negotiations. Buchko indicated he has utilized over 100 hours of PDO and two floating holidays participating in negotiations. Buchko has attended 17 of the 18 bargaining session held to date.

Inasmuch as leave status for employee negotiators plays the central role in this case an overview of the Company's leave policies is helpful in understanding the parties positions. In the Company's written leave policy the stated intent for PDO is "Employees earn paid time off to be used for absences such as leisure, personal business, short-term personal or family illness, and emergency facility closings." PDO is accrued based on length of company service with 1 to 10 years company service earning 4 weeks of PDO per year. Five additional PDO are awarded to employees who observe the tenth and twentieth service anniversary of employment. Employees can carry over a balance of 40 hours of PDO into the next year. According to Company Vice President of Service Delivery Miller PDO operates on a "no fault" type arrangement where employees can take PDO for any or no reason.

The Company provides 10 paid holidays in addition to PDO. Six of the holidays (New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas) are designated while 4 are floating holidays selected by the employee. The Company also provides one paid "Community Involvement" day each year. As applicable the Company allows up to 12 weeks unpaid family and medical leave per year. The Company provides parental leave of 5 paid days off "after the birth of a child or placement in the home for adoption." The Company provides 3 paid days of funeral leave "if there is a death of an individual significant to the employee." The Company

grants reasonable paid time for employees to vote in general elections and grants paid time off for jury duty.

The Company also has a "Personal Leave of Absence Policy" the stated intent of which is "to recognize that reasonable requests for periods of time off beyond those provided by paid time off programs will be honored, providing that accommodation of the requests will not impact normal business operations." After a year of employment employees are eligible for 12 months of unpaid leave (which may be extended to 24 months) "for reasons such as full time education programs, family relocations, serious personal problems, campaigning for political office, or other reasons with management approval."

The Company's military leave policy provides it will maintain an employee's current level of compensation for up to 10 working days each military training year and for 6 months of involuntary call to active duty.

B. Analysis and Concluding Findings

As noted earlier the complaint alleges the Company failed to grant unpaid leave to employee members of the Union's bargaining committee to attend bargaining sessions insisting they utilize PDO for time spent at negotiations and refused to meet at times when employee members of the Union's bargaining committee were not scheduled to work. It is alleged the Company's actions constitute a violation of Section 8(a)(5) and (1) of the Act.

1. Legal principles

Both parties reviewed the Board's holdings in *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), and *Milwhite Co.*, 290 NLRB 1150 (1988). The Government argues the two cases are controlling herein and demonstrate the Company has violated the Act. The Company, on the other hand, argues the two cases do not stand for the proposition the Government advances and are otherwise distinguishable. A review of the two above-cited cases is informative prior to setting forth the positions of the parties. In *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977) [reconsidered sua sponte and affirmed 235 NLRB 1128 (1978)], enfd. 599 F.2d 185 (7th Cir. 1979), cert. denied 444 U.S. 1014 (1980), the Board considered the issue of an employer not granting uncompensated leave for union committee members to attend bargaining sessions while at the same time refusing to meet for bargaining at times other than the normal workday. The Board reasoned as follows:

> The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) if the Act by (1) refusing to meet with the union representatives outside working hours, and by (2) simultaneously refusing to allow members of the bargaining committee leave without pay to travel to and participate in negotiations with respect to units in which they are not employed. The Respondent defended its actions principally on the theory that at least one "traveler" and member of the committee, VanAman, was a troubleshooter whose presence could not be spared for the aggregate of 11 days requested to participate in these negotiations. The alleged violation was not pinned to one or the other of the Respondent's actions, but resulted from the application of both actions together, which effectively deprived the Union of the assistance of the bargaining representatives it desired. We find that the Respondent's refusal to grant members of the Union's negotiations committee uncompensated leave to permit them to engage in bargaining during working hours, while at the same time refusing the Union's request to bargain during nonworking hours, is an unlawful interference with the Union's selection of its bargaining representatives.
>
> We do not suggest that an employer is compelled to yield to a union's request for negotiations outside normal business hours. It is free to insist on bargaining during the working day, if it prefers, as the Respondent did here. If it makes this choice, however, it cannot at the same time refuse to allow unpaid time off to union representatives on the bargaining committee because they are employed in another unit. Alternatively, the Employer is free to acquiesce in the Union's request to bargain during nonworking hours in order to reduce the amount of uncompensated leave for travelers and to minimize the effects of the unavailability during their regular working hours of emergency troubleshooters.
>
> However, the Respondent cannot have it both ways. That is, if, as here, the Respondent makes the choice to bargain during the working day, it cannot lawfully refuse to allow union employee representatives time off. But, if it does refuse to give such employees time off, then it is obligated to make itself available for negotiations at a time—even outside working hours—when the representative can attend. It is the Respondent's attempt here to have it both ways that constitutes the violation of the Act.

The Board in *Milwhite Co.*, 290 NLRB 1150 (1988), adopted Judge Pargen Robertson's decision addressing, in part, the issue of whether an employer could lawfully refuse to negotiate with its employees' chosen bargaining representative who happened to be one of its two employee bulldozer operators whose job it was to remove overburden from clay that the remaining employees processed. The employer in *Milwhite* asserted it could not afford to have one of its two bulldozer operators absent from work for negotiations because it would throw approximately 50 percent of its production employees out of work. In response to the employer's concerns the union offered to bargain during nonwork periods; however, the employer contended long bargaining sessions at night would likely result in the bulldozer operator not being able to perform his work in an acceptable fashion the next workday. The employer refused to negotiate with the bulldozer operator present at negotiations. Judge Robertson, quoting at length from *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), concluded, among other things, an "employer may not simply refuse to negotiate on the grounds that a valuable employee is included on the negotiating committee." Judge Robertson noted that if an employer is concerned with loss of an employee's services as a result of the employee's presence at negotiations during normal work hours there exists a possibility the employer may insist on a reasonable alternative. Judge Robertson observed, however, that when the union attempted to reconcile the employer's problem concerning the loss of the services of its bulldozer operator it

offered to meet and negotiate during nonworking times. The employer refused. Judge Robertson concluded "the [employer] cannot have it both ways. It cannot refuse to meet both during work and non-work times on its assertions that it cannot afford to lose [one of its two bulldozer operators] during work." Judge Robertson found an 8(a)(5) violation of the Act. Judge Robertson also concluded, "[the employer's] argument that negotiations would interfere with production if [one of its two bulldozer operators] is present regardless of whether the negotiations occurred during work or non-work times is unreasonable."

2. Positions of the parties

The first position advanced by the Government is that the guarantee of free choice contained in the Act encompasses the right of employees to select, absent extraordinary circumstances, whomever they wish to represent them in collective bargaining with an employer. *NLRB v. Indiana & Michigan Electric Co.*, 599 F.2d 185 (7th Cir. 1979), citing *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937). The Government notes an employer has the burden of showing the existence of such extraordinary circumstances or it violates the Act by interfering with its employees' choice of negotiators. The Government argues a case of unlawful interference in the selection of bargaining representatives is established where an employer takes the position that it will only bargain during the working day and forbids employees from taking *unpaid* time to participate in negotiations. The Government notes the employer in *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), refused to permit employee members of the union's bargaining committee who were located at distant plants, referred to as "travelers," to attend negotiations other than those scheduled in their own locations. The union refused to proceed with further negotiations until the employer altered its position. The union proposed meeting outside normal work times but the employer refused to set any night or weekend bargaining times. The Government argues the employer's reasoning is similar to the Company's position in the instant case, that it would be unreasonable to ask its managers to devote their nights and weekends to negotiations. The Government asserts the theory of a violation in *Indiana & Michigan Electric Co.*, supra, was "not pinned to one or the other of the Respondent's actions, but resulted from the application of both actions together, which effectively deprived the Union of assistance of the bargaining representative it desired." Government counsel states "[t] he same theory is advanced by [Government counsel] in the instant matter." The Government notes the Board in *Indiana & Michigan Electric Co.*, supra, found the employer's actions violated the Act and issued an affirmative bargaining order:

> We find that the Respondent's refusal to grant members of the Union's negotiation committee uncompensated leave to permit them to engage in bargaining during working hours, while at the same time refusing the Union's request to bargain during nonworking hours, is an unlawful interference with the Union's selection of its bargaining representative.

Government counsel points out the Board's rationale was simply that an employer cannot have it both ways; it may not insist on bargaining during the workday, and at the same time refuse employee representatives' requests for time off for negotiations. Government counsel notes the Board held that if an employer refuses to grant time off then the employer is obligated to make itself available for negotiations at a time, even outside working hours, when the representatives can attend.

Government counsel asserts the Board followed its *Indiana & Michigan Electric Co.*, supra, rationale in *Milwhite Co.*, 290 NLRB 1150 (1988). Government counsel notes the Board was faced with a situation where an employer refused to negotiate with the union in the presence of a specific employee who was an elected member of the Union's negotiating committee. The Government notes the employer in *Milwhite Co.*, supra, contended it could not afford to have the specific employee attend bargaining because his absence from work would throw 50 percent of the other employees into a situation where they would be unable to perform their work. Government counsel notes the union in *Milwhite Co.*, supra, as in the instant case, offered to negotiate during nonwork periods but the employer there, as in the instant case, rejected that option. The Government notes the Board in *Milwhite Co.*, supra, adopted Judge Pargen Robertson's conclusion that a violation occurred. Judge Robertson explained that if the employer was concerned with the loss of an employee's services because of the employee's presence at negotiations the employer may insist on a reasonable alternative such as offering to meet and negotiate during nonworktimes, but the employer could not refuse to meet both during work and nonworking times on its assertions that it could not afford to lose a specific employee during worktime.

The Government argues *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), and *Milwhite Co.*, 290 NLRB 1150 (1988), "speak of employee-negotiators' right to take uncompensated leave, not paid leave, as [the Company] has granted." Government counsel further argues, "[the Company's] contention that it has not violated the Act because 'the Union's negotiating team members have not been refused any time off to attend negotiations' is specious. They *have* been denied unpaid leave to bargain." The Government argues motivation is irrelevant in this type violation, asserting it is in the nature of a strict liability violation. The Government asserts that once it is shown that an employer has denied unpaid time to employee-negotiators along with a refusal to meet nights or weekends a violation is established.

Government counsel asserts the facts herein are undisputed that the Company would meet only during regular work hours, refused to meet at other times, and refused to allow the employee-negotiators unpaid leave to attend scheduled bargaining sessions. The Government notes the Company had three valid options it could have taken consistent with applicable case law namely: 1) it could have paid employee-negotiators to attend negotiations with no loss of PDO; 2) it could have granted unpaid leave to employee-negotiators to attend bargaining; or, 3) it could have agreed to meet after hours for negotiations. The Government asserts the Company chose none of its legal options. Government counsel argues the Company advanced no extraordinary circumstances to establish why its insistence on penalizing employee-negotiators by charging them PDO was necessary, nor was such circumstances shown for its unreason-

able refusal to meet after hours for negotiations. The Government contends it established a clear violation of the Act.

Government counsel argues the absence of the six (or less) employee-negotiators from work to attend bargaining did and will not unduly disrupt the Company's scheduling because the employee-negotiators involved come from different work groups in a work force of approximately 130. The Government asserts meeting on weekends could have eliminated this concern of the Company all together.

Government counsel argues the Company's contention it could not grant employee-negotiators unpaid leave to negotiate because of its past practice with respect to its PDO policy is invalid. Government counsel argues that since there had never been a union at the Company prior to this time there could not have been any past practice with regard to the type of leave that would be appropriate to cover employee absences for the purpose of participating in collective bargaining. Government counsel argues the Company's PDO policy is simply not intended to cover absences of the type at issue herein but rather that it was intended to cover absences for personal reasons such as vacations.

The Company contends it has consistently applied its PDO policy in a lawful manner when dealing with employee absences from work including its requirement that employee members of the Union's negotiating committee be charged PDO for the time they spend at negotiations. The Company contends the law is settled that employers are not required to pay employees for time spent attending negotiations. *Procter & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 975 (4th Cir. 1981). The Company asserts no meaningful distinction can be drawn between an employer's lawful policy of not paying employees for time spent away from work at negotiations and its practice of paying its employees for time spent at negotiations but then deducting PDO for such time pursuant to its long established policy.

The Company notes an employer is free to insist that negotiations take place either during business or evening hours. *Milwhite Co.*, 290 NLRB 1150 (1988), and *People Care, Inc.*, 327 NLRB 814 (1999). The Company asserts the only restriction placed on an employer in insisting when negotiations take place is it may not interfere with a union's ability to designate its employee negotiating representatives. The Company argues it has in no way interfered with the Union's right to designate its representatives by application of its PDO policy to the employee members of the Union's negotiating committee. The Company strongly asserts it has never, by any of its actions, attempted to dictate or control which employees the Union chooses to bring to the bargaining table. The Company notes it has agreed to grant employee negotiating representatives as much leave with pay as needed to attend negotiations; but, that it merely requires the leave be charged against the employee representative's PDO account in the same manner that other employee nonbusiness time off from work is charged. The Company contends it has placed no limitations on the ability of employee representatives to trade shifts with co-workers to attend contract negotiations. The Company argues in its post trial brief that Government counsel's reliance on *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), and *Milwhite Co.*, 290 NLRB 1150 (1988), to support the proposition the Company is required to give *unpaid* time off for the Union's employee representatives to attend negotiations does not withstand scrutiny. The Company asserts the Government simply reads too much into the two cases. The Company argues the two cases merely hold that an employer is obligated, under the Act, to provide employee representatives time off from work to attend negotiations where the employer insists, as is the case herein, on holding bargaining during normal business hours. The Company contends neither of the two cases mandates that the time off granted employee representatives for negotiations be *unpaid* time off.

The Company in expanding its argument regarding the two cases contends that in *Indiana & Michigan Electric Co.*, supra, the employer defended its refusal to grant an employee member of the union's bargaining committee unpaid time off to attend negotiations on the grounds the employee was a troubleshooter whose presence could not be spared for the aggregate of 11 days of bargaining. Yet the employer at the same time refused to meet with the union outside working hours. The Company argues the Board's holding was that the employer's application of both actions deprived the union of the assistance of the bargaining representative it desired and as such violated the Act.

The Company argues *Indiana & Michigan Electric Co.*, simply stands for the proposition that an employer that insists on bargaining during working hours cannot simultaneously refuse employees *time off* to attend negotiations. The Company argues it was the employer's refusal to give the employee *any* time off to attend negotiations during working time that was found to violate the Act. The Company contends the Board did not so much as address any distinction between paid and unpaid time off, much less hold that all time off granted must be unpaid time off. The Company asserts it has never denied any employee-member of the Union's bargaining committee time off for negotiations.

The Company notes that in *Milwhite Co.*, 290 NLRB 1150 (1988), the employer resisted bargaining when the union wished to include on its negotiating committee one of the employer's two bulldozer operators because it would result in a reduction by one-half of the work for its production employees. The Company notes the union therein offered to negotiate during nonwork periods but the employer refused saying the bulldozer operator would be too tired to perform his work properly the next day. The Company asserts the Board, relying on *Indiana & Michigan Electric Co.*, supra, held it was the employer's refusal to meet during either work or nonwork times with its bulldozer operator as a member of the union negotiating committee that violated the Act.

The Company argues that *Indiana & Michigan Electric Co.*, supra, and *Milwhite Co.*, supra, both stand for the same proposition, namely, that where an employer insists on negotiating during business hours it may not lawfully, at the same time, refuse to allow employee union representatives time off to attend negotiations. The Company argues neither case requires an employer to grant *unpaid* time off in order to avoid violating the Act.

The Company contends the allegation it has refused to meet at times when employee members of the Union's bargaining

committee are not scheduled to work is false as a factual matter. The Company notes the Union's bargaining committee consists of employees who work all three shifts at the Company, thus there is no time during which all of the Union's employee representatives are available to attend negotiations during nonworking times. The Company acknowledges there are two occasions when it grants employees unpaid leave but asserts neither situation is applicable for attending negotiations. The Company's two unpaid leave occasions cover family medical leave situations pursuant to the family medical leave act and long term unpaid personal leave to pursue educational or other long term endeavors.

Finally the Company argues charging PDO for negotiations is necessary to ensure staffing levels remain predictable. The Company projects 33 days of absence per employee per year and plans its staffing needs accordingly. The Company argues if union employee negotiating committee members were allowed additional unpaid leave it would create unnecessary staffing problems for the Company.

3. Additional conclusions

A careful reading of *Indiana & Michigan Electric Co.*, 229 NLRB 576 (1977), fully persuades me that the Government's position is correct and a violation of the Act has been established. The Board in that case repeatedly made it clear that it is a violation of the Act for an employer to insist that bargaining taking place during the working day while at the same time refusing to allow employee union negotiating committee members to take "uncompensated leave" or "unpaid time off" to negotiate. The Company herein has done exactly what Board cases disallow and its actions violate the Act and I so find. The Company's assertion that it has never denied employee-members of the Union's negotiating committee time for negotiations is correct. However, that does not address the ramifications of the Company's actions for the employees on the Union's committee. What the Company's actions amount to is a requirement that the employee-members utilize what in essence is their vacation time just to be able to participate in negotiations. This is an unjustifiable position by the Company in light of Board precedent. The Company's position that the employees are free to participate in negotiations but may lawfully suffer a penalty for doing so may technically be correct. Employees, for example, may be asked to take leave without pay; however, in the instant case the Union has agreed to reimburse its members or if the Company pays them to reimburse the Company. What the Company herein may not lawfully do is unfairly penalize the employee-members of the Union's negotiating committee by requiring them to utilize their personal/vacation time to participate in negotiations. To allow the Company to force the employee-members to utilize their personal/vacation leave time for negotiations is dictating who will make up the Union's committee. Some employees who might otherwise be willing to participate may nonetheless not be willing to surrender their vacation time to do so.

The Company has a very workable Board approved solution, namely, grant employee-members leave without pay or meet at times when the employee-members are not working. Although the Company contends there is no time when at least some of the employee-members of the Union's negotiating committee would not be working such contention is refuted by Company Vice President of Service Delivery Miller's testimony that she was sure there were times during the workweek, particularly on a weekend day, when all of the Union's employee-members of the negotiating committee could be present for negotiations without impacting their work schedules. The Company's contention it cannot give unpaid leave to the six (or less) employee-members because it would disrupt their scheduling is unpersuasive. First, this is a work force of approximately 130 employees. Second, the employee-members come from different work groups or departments thus the impact, if any, is minimal, and could be avoided all together by bargaining weekend days for example. Finally, the Company's contention it cannot give unpaid leave to employee-members of the Union's negotiating committee because it would violate their PDO policy is likewise unpersuasive. First, it does not appear that the PDO policy contemplates or addresses leave for contract negotiations. Second, it appears absences for negotiations are more in the nature of absences for work-related reasons and thus not applicable to or governed by the PDO policy.

In summary I find the Company has violated Section 8(a)(5) and (1) of the Act as outlined in the complaint and as established by Government counsel at trial.

CONCLUSION OF LAW

By refusing to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining sessions and insisting they use their personal days off for time spent at negotiations and refusing to meet at times when the Union's bargaining committee was not scheduled to work the Company violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having failed to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining sessions and insisting they use their personal days off for time spent at negotiations and refusing to meet with the employee members of the Union's bargaining committee when they were not scheduled to work, I shall recommend the Company be ordered to grant unpaid leave to the employee members of the Union's bargaining committee for the purpose of attending bargaining sessions, or in the alternative, upon request, meet for bargaining with the Union at mutually agreed-upon times outside the normally scheduled workday. For those occasions where the Company insisted that bargaining take place during the normal workday and at the same time refused to grant the employee members of the Union's negotiating committee unpaid leave to attend the negotiations, I shall recommend the Company restore the personal days off taken by the employee members of the Union's negotiation committee.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Company, Ceridian Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Service Employees International Union Local 113 as the exclusive representative of all employees in the unit by refusing to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining, or in the alternative, cease and desist from refusing to meet at times when employee members of the Union's bargaining committee are not scheduled to work.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant employee members of the Union's bargaining committee unpaid leave for the purpose of attending bargaining sessions, or in the alternative meet for bargaining at times when employee members of the Union's bargaining committee are not scheduled to work.

(b) Restore the personal days off taken by employee members of the Union's negotiating committee for those occasions when the Company insisted negotiations take place during the normal workday and at the same time refused to grant employee members of the Union's negotiating committee unpaid leave to attend negotiations.

(c) Within 14 days after service by the Region, post at its facility in Eagan, Minnesota, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to employees to all current employees and former employees employed by the Company at any time since September 22, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. August 5, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT refuse to bargain with Service Employees International Union Local 113 by failing and refusing to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining sessions, while refusing to meet at times when the Union's bargaining committee is not scheduled to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, grant employee members of the Union's bargaining committee unpaid leave for the purpose of attending bargaining sessions, or in the alternative meet for bargaining at times when employee members of the Union's bargaining committee are not scheduled to work.

WE WILL restore the personal days off taken by employee members of the Union's negotiating committee for those occasions when we insisted negotiations take place during the normal workday and at the same time refused to grant the employee members of the Union's negotiating committee unpaid leave to attend negotiations.

CERIDIAN CORPORATION

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."